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January 14, 1994

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Suite 222
Washington, D.C. 20554

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JAN 14 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: CC Docket No. 93-292

Dear Mr. Caton

Submitted herewith on behalf of National Cellular Resellers Association is an original and four copies of its Comments in CC Docket No. 93-292.

Very truly yours

Joel H. Levy

Enclosure

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JAN 14 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

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In the Matter of
Policies and Rules
concerning Toll Fraud

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CC Docket No. 93-292

COMMENTS OF THE NATIONAL CELLULAR RESELLERS ASSOCIATION

The National Cellular Resellers Association ("NCRA"), by its counsel, herewith submits its comments in response to the Notice of Proposed Rulemaking ("NPRM"), released by the Commission December 2, 1993.

1. The NCRA is a national association of entities that resell to the public cellular mobile service provided by facilities-based carriers. While cellular resellers do not operate in all cellular markets, they represent a significant means for distribution of cellular service. A typical reseller makes available to end-user customers the ability to purchase equipment and subscribe to either of the two facilities-based cellular services offered in a particular market. These arrangements now provide for the facilities-based carrier to make available to the reseller usage tapes which allow the reseller to bill for airtime usage of the end-users of the cellular service including local, IXC, and international calls originated by or directed to the end-

user. The cellular reseller does not, however, control the provision of cellular service which is operated by the facilities-based licensee, nor does it have control over the interconnection of the local facilities-based cellular carrier with the local exchange carrier or the long distance carriers and ultimately other local exchange carriers to which cellular calls may be directed or from which they may be received. In a similar manner calls originated outside the home territory of the cellular subscriber when a subscriber is roaming in a foreign cellular jurisdiction are not under the control of the cellular reseller.

2. One of the serious toll fraud issues surrounding the provision of cellular service involves unauthorized use of cellular ESN and MIN, where an ESN or MIN is cloned or otherwise tampered with to facilitate the making of a long distance call by an unauthorized user. The interest of NCRA in this issue arises out of the significance of such fraud, and the liability which should be assessed among interested parties, as well as the means by which it may be hindered or largely prevented.

3. Inter-exchange carriers and facilities-based cellular operators should not be permitted to pass on to resellers responsibility for payment of cellular toll fraud charges. Since neither the ultimate end-user customer nor the cellular reseller has any means within its control to monitor or prevent such fraud, the Commission should, in this proceeding, take the opportunity to

rule that resellers and their end-user customers may not be held civilly liable for payment of such charges arising out of the unauthorized use of their ESN or MIN unless the fraudulent use of such ESN/MIN is a result of the direct negligence of the end-user customer or the cellular reseller.

4. The allocation of the cost and the attribution of liability for cellular toll fraud represents a difficult issue and there may be no means satisfactory to all interested parties by which to allocate such costs. However, to charge back to cellular resellers and their customers the cost and liability for such fraudulent charge is contrary to the statutory provisions of Sections 201, 202 and 203 of the Communications Act. Such charges cannot be assessed for services not provided or requested by either the cellular reseller or its end-user customer.

5. First, it is entirely random which cellular number is fraudulently cloned and only by happenstance that a reseller's customer's number may be the vehicle for unlocking access to the cellular carrier or the IXC.

6. What has happened here is that the thief has independently created a key to the telecommunications network. The fact that that same electronic key is the means by which an authorized customer gains legitimate access to the telecommunications network in no way therefore reposes liability

on the reseller or its authorized user for the fraudulent access to the network by others. In the words of the Commission's United Artists decision (FCC 93-387, released August 18, 1993) the legitimate user, in this example, is simply not the "customer" which has "order[ed]" the service (either directly or through an agent) and is [therefore] responsible for payment of tariffed charges for services furnished to a thief. At para. 9.

7. Secondly, the carriers can monitor, as resellers are now unable to do, the quantity and nature of toll usage to diminish such fraud. In one instance, a number of a reseller customer was cloned, and \$72,000 of charges were incurred over a weekend where numerous phones were engaged using the same cloned number. Effective real time monitoring, which is available through technical and personnel oversight, would have discovered early on the pattern of unauthorized calls and allowed for the shutting down of the number at an early stage. Carriers (cellular and IXC's) have such oversight capability in their switches and ancillary computer systems. Resellers have no such capability and are not now encouraged or allowed to operate such equipment by facilities-based carriers.

8. It is simply arbitrary, discriminatory, unreasonable and unjust for such charges to be assessed to resellers or their customers by regulated carriers under these circumstances and the Commission should so rule in this proceeding. While this

ordinarily may be considered a matter of civil liability, the Commission should rule that it has preempted such liability in the interest of carrying out its responsibilities under Sections 201, 202 and 203 of the Act to provide for the provision of just and reasonable charges by common carriers under its jurisdiction.

9. However, the installation of a reseller-owned switch, controlled and operated by a cellular reseller for provision of billing, enhanced services, switching and other related activities, would allow cellular resellers the means by which they could program, monitor and adopt protocols that would identify usage patterns by its customers, or install blocking mechanisms, to prevent fraudulent calls from being completed using the ESN or MIN of one of its customers. At the present time there is before the Commission the proceeding to implement the provisions of Section 3(n) and 332 of the Communications Act (GN Docket No. 93-252), adopted in the Budget Reconciliation Act in 1993 and which requires CMS providers to provide interconnection upon reasonable request to any person requesting the same.

10. The installation of a reseller owned switch would give a measure of control to cellular resellers that would allow more effective identification of fraudulent cellular calls. NCRA has submitted comments to the Commission in GN Docket No. 93-252 arguing that sound public policy and the requirements of the Communications Act dictate the opening of the facilities-based

carriers network on an interconnected basis to cellular resellers own switches. In addition to the reasons set out in those Comments, however, NCRA wishes to bring to the attention of the Commission, by way of its comments in this proceeding, the additional benefits that would be available to prevent and identify cellular toll fraud through cellular reseller owned switches.

11. The Commission should, in this proceeding, adopt rules which preclude the imposition of civil liability for charges incurred by usage of cellular phone numbers otherwise identified as belonging to customers of resellers when resellers have no control over the use of such numbers and should implement the proposals suggested by NCRA in GN Docket No. 93-252 with regard to interconnection of cellular resellers own switches to the cellular network and LECs and IXCs to advance the goals in this proceeding of preventing, deterring, and identifying of cellular toll fraud.

Respectfully submitted,

NATIONAL CELLULAR RESELLERS ASSOCIATION

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Dated: January 14, 1994